IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-537

IN THE MATTER OF

LARRY L. (ANONYMOUS),

Petitioner,

vs.

VERONICA P. (ANONYMOUS),

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

On Writ of Certiorari to the Court of Appeals of the State of New York

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PRELIMINARY STATEMENT

Petitioner Larry L. (Anonymous) seeks a Writ of Certiorari to review a judgment of the Court of Appeals of the State of New York, rendered June 16, 1977, modifying an Order of the Appellate Division, Second Department, rendered January 26, 1976 which

reversed two orders of disposition of the Family Court of the State of New York, Westchester County, entered November 21, 1969 and June 16, 1975. By the November 21, 1969 order, the Family Court (Walsh, J.) adjudged Petitioner to be the father of Respondent's child, and ordered Petitioner to make payments in support of that child. The subsequent order of the Family Court (Gurahian, J.) directed Petitioner to pay accumulated arrears.

JURISDICTION

The jurisdiction of this Court would have been predicated upon 28 U.S.C. §1257(3). However, the petition was apparently received by the Clerk of the Court on the ninety-first day following the judgment sought to be reviewed and hence was untimely. 28 U.S.C.A. 2101(c); U.S. Sup. Ct. Rule 22(3), 28 U.S.C.A.

STATEMENT OF THE CASE

By order to show cause dated November 19, 1965, a paternity proceeding was commenced in the Family Court of the State of New York, Westchester County, to declare Larry L. (Anonymous) father of a child, Debra Ann (A 9), born to Veronica P. (Anonymous) out of wedlock on September 6, 1965 and to order the payment of support.

On November 26, 1965, Larry L. and Veronica P. appeared before Family Court Judge Albert L. Fiorillo. At that time the petition was read and Larry L. was advised of his rights "to counsel, a

blood-grouping test, and a trial". The court granted Larry L.'s request for an adjournment to secure counsel.

On December 10, 1965, the parties, represented by counsel, again appeared before Judge Fiorillo. Larry L., through his retained attorney, denied the allegations in the petition and requested a blood grouping test. The court granted that request and adjourned the proceeding. On January 28, 1966 the results of the test were reviewed by Family Court Judge William A. Walsh, after which the proceeding was adjourned to March 8, 1966, for trial. However, trial of the matter was repeatedly adjourned for various reasons upon consent of both counsel.

By letter dated January 26, 1967, addressed to the attorneys for the respective

parties, the Clerk of the Family Court advised that the week of February 20, 1967 had been specially designated for the trial "of a large number of paternity cases", and that the instant matter had been scheduled for trial on February 21, 1967. The letter concluded with the express warning that "[a]djournments will only be granted upon legal excuses submitted in affidavits prior to the trial date."

On February 21, 1967, the date set for trial, Veronica P. and counsel for both parties appeared before Judge Fiorillo. Larry L. was absent. The Court's entries in the "Record of Proceedings" indicated that Larry L.'s attorney:

> "...produced letter dated 2/14/67 allegedly written by...[Larry L.] which states that he is departing from Bayonne Naval Base on 2/14/67 on S.S. Saphire Etta and expects to be away for 60 days".

The court noted the numerous times that the matter had appeared on the court's calendar without disposition, and that Larry L.'s counsel had been fully advised as to the date established for trial. Thereupon, Judge Fiorillo referred the proceeding to Judge Walsh for immediate trial.

Veronica P. testified before Judge Walsh, and she was cross-examined by Larry L.'s attorney. At the conclusion of the hearing, Larry L.'s attorney moved "for [a] dismissal for lack of medical information." The court reserved decision.

In an opinion rendered March 7, 1967, Judge Walsh reviewed Veronica P.'s testimony

and concluded that Larry L.'s paternity of the child had been proved. The court declared Larry L. to be the father and directed him to pay child support and confinement expenses totalling $10.00 per week. The decision concluded with a direction to "[s]ubmit order on five days notice."

Apparently neither party submitted a proposed order for settlement. And so, on November 21, 1969, approximately two years and nine months after the court's determination of paternity and direction for support, Judge Walsh entered an order of filiation, sua sponte. Included therein was an order for payment of child support and confinement expenses "to commence April, 1967".

Two weeks after the entry of the court's order, on December 2, 1969, Larry L. and his attorney appeared before Judge Walsh. At that time, Larry L.'s counsel requested that the order of filiation be vacated because he had not been served with a copy of the proposed order with notice of settlement before the order was entered. The matter was then adjourned in order to allow the County Attorney an opportunity to submit a reply to the oral motion. The County Attorney's responsive papers, with proof of service, were apparently filed with the court on January 29, 1970. The court did not grant the motion to vacate, nor did it stay enforcement of its order of filiation and support.

In the interim, on December 24, 1969, a copy of Judge Walsh's order of filiation and support had been served on Larry L.'s attorney by Petitioner's counsel. It does not appear that the order was accompanied by written notice of entry.

On June 16, 1975, the instant matter was reviewed by Family Court Judge Vincent Gurahian, at which time Larry L. was represented by different legal counsel. Judge Gurahian was "advised" that Larry L. had not made any of the payments mandated by the November 21, 1969 combined order of filiation and support. Thereupon, Judge Gurahian entered a modifying order requiring Larry L. to pay the previously specified child support and confinement

expenses, retroactive to March 7, 1967, and directing the Department of Probation to compute the arrears resulting from Larry L.'s previous non-compliance. Apparently, a copy of Judge Gurahian's order was not formally served upon Respondent. Larry L. appealed.

On January 26, 1976 a three-justice majority of the Appellate Division, Second Department held that as a matter of law the Family Court had lost jurisdiction to enter the order of filiation "by reason of the lapse of two and one-half years between the time of the decision on the petition and entry of the order of filiation." Matter of Veronica P. v. Larry L., 51 AD 2d 574 (2nd Dept, 1976). The court's opinion and order specifically stated that "[n]o fact issues were raised on this appeal", and, accordingly, it "remanded

[the proceeding] to the Family Court for a de novo hearing and determination as to the issues of paternity and support." The two dissenting justices concurred in the majority's decision to remand the proceeding. However, they contended that the purpose of the remand should be "solely for a new fixation of child support arrears." Matter of Veronica P. v. Larry L., supra.

On June 16, 1977, the New York Court of Appeals modified the Appellate Division's order, ruling that the Family Court had not lost jurisdiction to enter the original order of filiation. In addition the Court remanded the case to the Family Court to consider whether recovery of prior support payments from Larry L. was

barred under theories of either abandonment or laches; whether the level of support was reasonble and whether the amount of arrears was correctly determined.

ARGUMENT

Conclusorily asserting that he "was not accorded the right to be present at the hearing the purpose of which was to determine paternity" (Petition, p.10), Larry L. asserts that he was denied due process since paternity was established in his absence. His claim is frivolous.

For although Petitioner twice glosses over critical facts (Petition pp. 4,7), it is beyond dispute that he was advised of the date of the paternity hearing which he was at liberty to attend with his counsel, and cautioned by the Court that "[a]djournments [would] only be

granted upon legal excuses submitted in affidavits prior to the trial date." Under these circumstances Larry L.'s failure to attend the hearing and both his and his attorney's failure to comply with the Court's reasonable requirements for an adjournment, hardly make for a denial of due process.

Larry L.'s additional claim, that the Family Court somehow lost jurisdiction over his paternity proceeding in view of the two and one-half year delay between the determination of paternity and the entry of an order to that effect, presents no question of federal concern. The issue of how long certain New York State courts retain jurisdiction in certain types of cases is manifestly a question exclusively for the judgment of the State Courts. Smith v. Adsit, 83 U.S. 185, 190 (1872).

CONCLUSION

The Writ of Certiorari should be denied.

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